Supreme Court, U.S.
FILED
AUG 26 1998
CLERK

No. 98-41

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

ROBERT L. VERA CRUZ,
Petitioner,

v.

CITY OF ESCONDIDO,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONSE TO PETITIONER'S QUESTION PRESENTED

The "Question Presented" as set out in the Petition for Writ of Certiorari does not properly state either the facts or the law at issue here. Petitioner's formulation of the question presented would be more appropriately stated as follows (italics represent modifications to the petitioner's version):

"Whether the court below erred by holding that the use of a police dog to 'seize' a *violent armed felony* suspect by inflicting *serious, but not life-threatening* bite wounds causing permanent injuries was not 'deadly force' under *Tennessee v. Garner* because it was not force 'reasonably likely to kill,' notwithstanding the fact that the Model Penal Code's definition of 'deadly force' as force creating a 'substantial risk of causing death or serious bodily injury' urged by petitioner has been *alluded to* by every other circuit court to consider *the issue of the proper use of deadly force* and *adopted* by law enforcement agencies across the country as *their operative* definition of 'deadly force.' "

But this "Question Presented" is more fact-specific than the Court of Appeals opinion presently before this Court for review. In light of that, a better formulation of the question presented would be as follows:

In the context of a federal civil rights claim alleging the excessive use of force by a police officer, did the Court of Appeals correctly interpret this Court's decisions in *Tennessee v. Garner* and *Graham v. Connor* to implictly define the term "deadly force" to mean "force reasonably likely to kill", rather than force that "create[s] a substantial risk of causing death or serious bodily injury"? And regardless of the answer, does the rule expressed in *Tennessee v. Garner* even apply where the suspect is *armed*?

TABLE OF CONTENTS

	Page
RESPONSE TO PETITIONER'S QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING CERTIORARI	5
I. THERE ARE NO COMPELLING REASONS WHY THIS DECISION SHOULD BE REVIEWED BY THIS COURT	5
A. There Is No Meaningful Conflict Between *Vera Cruz* And Any Other Appellate Or District Court Decision, Including *Tennessee v. Garner*	5
B. The Issue Presented Here Need Not Be Decided By This Court, And In Any Case Is Not Yet Ripe For Review	6
C. Review Is Not Appropriate Here Because Even A Complete Reversal Would Not Change The District Court Judgment	8
D. Regardless Of The Definition Of Deadly Force Used, *Tennessee v. Garner* Does Not Apply To This Case, Unless This Court Chooses To Expand The Scope Of That Decision	10
II. *VERA CRUZ* CORRECTLY INTERPRETS THIS COURT'S DECISIONS IN *TENNESSEE v. GARNER* AND *GRAHAM v. CONNOR*	10

TABLE OF CONTENTS—Continued

Page

III. THE MODEL PENAL CODE'S DEFINITION OF DEADLY FORCE SIMPLY WAS NOT INTENDED FOR USE IN CIVIL CASES SUCH AS THIS 12

IV. THERE IS NO MEANINGFUL CONFLICT BETWEEN THE *VERA CRUZ* DECISION AND DECISIONS OF OTHER FEDERAL COURTS 15

A. *Pruitt v. City of Montgomery* 15

B. *Robinette v. Barnes* 17

C. *Matthews v. Jones* 18

D. *Marley v. City of Allentown* 19

E. *Ryder v. City of Topeka* 19

F. *Mathis v. Parks* 20

G. *Mattis v. Schnarr* 21

H. Ninth Circuit Cases 21

I. Post-*Vera Cruz* Case 22

V. THE PETITIONER'S CONCERN ABOUT UPSETTING EXISTING POLICE STANDARDS REGARDING DEADLY FORCE IS NOT A BASIS FOR GRANTING CERTIORARI HERE 24

CONCLUSION 26

TABLE OF AUTHORITIES

CASES

Page

Chesapeake & Ohio Railway Company v. De Atley, 241 U.S. 310, 36 S.Ct. 564, 60 L.Ed. 1016 (1916) 2

Chew v. Gates, 27 F.3d 1432 (9th Cir. 1994) 22

Fikes v. Cleghorn, 47 F.3d 1011 (9th Cir. 1995) 22

Gilliard v. Mississippi, 464 U.S. 867, 104 S.Ct. 40, 78 L.Ed.2d 179 7

Graham v. Connor, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) ..... i, 6, 10, 11, 19, 21, 25

Gutierrez v. City of San Antonio, 139 F.3d 441 (5th Cir. 1998) 7, 22, 23, 24

Marley v. City of Allentown, 774 F. Supp. 343 (E.D. Pa. 1991) 19

Mathis v. Parks, 741 F. Supp. 567 (E.D.N.C. 1990) 20, 21

Matthews v. Jones, 35 F.3d 1046 (6th Cir. 1994) 18, 19

Mattis v. Schnarr, 547 F.2d 1007 (8th Cir. 1976) 21

McCray v. New York, 461 U.S. 961, 103 S.Ct. 2438, 77 L.Ed.2d 1322 (1983) 7

Pruitt v. City of Montgomery, Alabama, 771 F.2d 1475 (11th Cir. 1985) 15, 16

Quintanilla v. City of Downey, 84 F.3d 353 (9th Cir. 1996) 22, 23

Robinette v. Barnes, 854 F.2d 909 (6th Cir. 1988) 7, 17, 18, 19, 20, 23

Ryder v. City of Topeka, 814 F.2d 1412 (10th Cir. 1987) 19, 20

Tennessee v. Garner, 471 U.S. 1, 85 L.Ed.2d 1, 105 S.Ct. 1694 (1985) ..... i, 5, 7, 10, 11, 16, 17, 19, 21, 23, 25, 26

Vera Cruz v. City of Escondido, 126 F.3d 1214 (9th Cir. 1997) 4, 23

Vera Cruz v. City of Escondido, 139 F.3d 659 (9th Cir. 1998) 5-8, 10-12, 14-16, 18-22, 24-26

STATUTES AND RULES

Supreme Court Rule 10 5

Supreme Court Rule 10(a) 5

Supreme Court Rule 10(c) 5, 6

TABLE OF AUTHORITIES—Continued

SECONDARY AUTHORITIES Page

Model Penal Code and Commentaries (Official Draft and Revised Comments), Part I, General Provisions, §§ 3.01 to 5.07 (1985) (American Law Institute, Philadelphia, PA) 12, 13, 14

Model Penal Code: Official Draft and Explanatory Notes (1985) (American Law Institute, Philaphia, PA) 12

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OPINIONS BELOW

In addition to the several opinions described by the petitioner in the section of his Petition for Writ of Certiorari entitled "Opinions Below" (at page 1 of the Petition), there are two additional relevant opinions.

One is the District Court's ORDER DENYING PLAINTIFF'S MOTION FOR JUDGMENT AS A MATTER OF LAW OR, IN THE ALTERNATIVE, FOR A NEW TRIAL, filed on November 27, 1995. (A copy of this order was not included as part of the appendix to the Petition for Writ of Certiorari, but can be found at pages 264-281 of the Appellant's Excerpts of Record [AER] filed in the United States Court of Appeals below.) This order was not published.

The other opinion is the Memorandum decision issued by the Court of Appeals on October 3, 1997 deciding those portions of the appeal which were not resolved in the Court's published opinion at issue here. This Memorandum was, of course, not published.

STATEMENT OF THE CASE

The petitioner, in his Statement of the Case, purports to provide this Court with the factual background of this matter. However, in doing so, he has chosen to present only *his* version of events, ignoring that this case was fully tried and that the jury returned a *defense* verdict. The facts that actually underlie this case, viewed, as they must be, in the light most favorable to the judgment (see *Chesapeake & Ohio Railway Company v. De Atley*, 241 U.S. 310, 311, 36 S.Ct. 564, 564, 60 L.Ed. 1016 (1916)), show the following:

On the evening of January 1, 1992, Officer Eric Distel of the Escondido Police Department was on patrol with his assigned police dog, Artus. At approximately 10:00 PM, he heard a dispatch over his car radio on the main police frequency that a drunk person (petitioner Robert L. Vera Cruz) was trying to break into a Del Taco restaurant and was threatening the employees. (2 RT 179) Shortly thereafter, Officer Distel heard a conversation regarding the incident over a secondary police radio frequency, which reported that the suspect had said that he was going to come back to the Del Taco and that he might have a gun. (2 RT 180)

A little later, Officer Distel received another radio dispatch advising that the petitioner had returned to the Del Taco, that he was "trying to smash in the window, kick in doors. He had been drinking, threatening the employees inside." (2 RT 180-181) Officer Distel immediately responded and arrived at the Del Taco within approximately 30 seconds. He was the first officer to arrive on the scene. (2 RT 182) The petitioner appeared to him to be "ex-

tremely agitated", going into the building and throwing things out. "He appeared to be irate, angry and, quite frankly, violent." (2 RT 186) Officer Distel exited his car, identified himself as a police officer, and told the petitioner to come over to him. (2 RT 186-187) Officer Distel was able to see that the petitioner was wearing a sheath on his belt containing a large knife. (2 RT 187-188) The petitioner then began walking away (2 RT 191), and Officer Distel responded by "yelling for him to stop or I would release the dog." (2 RT 191) The petitioner responded by beginning to run. (2 RT 191)

Officer Distel explained that based on what he had seen the petitioner doing, he had "formed the opinion that I was witnessing a felony [burglary] committed in my presence, an armed felony." (2 RT 190) Furthermore, he had observed that the petitioner "was extremely agitated, obviously violent." He was headed towards an area containing hundreds of units of "duplexes", with lots of "patios, walkways, apartments." (2 RT 194)

> "If he gets in there and had acted as agitated as he was, I have a potential hostage situation. . . . I feared for the safety of the community, and I thought he was going to get away. He was going to get into those apartments. Things were going to get a lot worse real quick." (2 RT 194-195)

So Officer Distel shouted a second warning. When the petitioner continued to run, Officer Distel released his dog. (2 RT 191-192) Artus apprehended the petitioner, and as Officer Distel ran up, he saw the petitioner vigorously trying to pull his arm free from the dog's bite. Officer Distel yelled at him to "quit pulling, stop moving". He then ran up to the petitioner, ripped the knife and sheath off his belt, and threw them to the side. He then grabbed Artus by the collar and verbally and physically ordered him to release his bite. The dog immediately complied, as he had been trained to do. (2 RT 197-198)

Officer Distel then ordered the petitioner to lay down. But instead of complying, the petitioner stood up and began walking away. Officer Distel immediately called for back-up on his portable radio. (2 RT 199) He did this instead of again releasing the dog because, in his mind, that would have been excessive, given that the petitioner was now disarmed and injured. (2 RT 200) A number of additional officers arrived and surrounded the petitioner, who finally stopped and went down to his knees. (2 RT 200-201) Other than the apprehension by the dog, the petitioner was not subjected to any use of physical force by Officer Distel or any other officer. (2 RT 201, 205) The petitioner was placed in a squad car and was immediately taken to Palomar Hospital for treatment for his injury. (2 RT 202)

The petitioner, by his own admission, was drunk at the time of this incident. (3 RT 506) At the hospital, he was asked by a police sergeant what had happened after the dog made contact with him, to which the petitioner replied that he did not remember a dog biting him. He didn't even remember *seeing* the dog or a police officer. In fact, when a nurse asked the petitioner what was wrong with him, he replied "Nothing." (4 RT 741)

The petitioner filed suit on December 22, 1992 in the United States District Court for the Southern District of California against the City of Escondido and various of its police officers. (AER 1) Trial began on June 20, 1995. (1 RT 47-48) On June 30th, the jury unanimously found, by way of special verdict, that Officer Distel had not used excessive force in the apprehension of the petitioner. (7 RT 1227-1228) The petitioner's motion for judgment notwithstanding the verdict, or, in the alternative, for new trial was denied on November 27, 1995. (AER 264-281)

Petitioner appealed and the judgment was affirmed on October 3, 1997. (*Vera Cruz v. City of Escondido,* 126 F.3d 1214 (9th Cir. 1997).) The petitioner's request

for rehearing or a rehearing *en banc* was denied and an amended opinion was issued on March 31, 1998. (*Vera Cruz v. City of Escondido,* 139 F.3d 659 (9th Cir. 1998), superseding the prior opinion.) This Petition for Writ of Certiorari followed.

REASONS FOR DENYING CERTIORARI

I. THERE ARE NO COMPELLING REASONS WHY THIS DECISION SHOULD BE REVIEWED BY THIS COURT

A. There Is No Meaningful Conflict Between *Vera Cruz* And Any Other Appellate Or District Court Decision, Including *Tennessee v. Garner*

Supreme Court Rule 10 describes "the character of the reasons the Court considers" when deciding whether to grant a petition for writ of certiorari. Of the reasons listed, the one on which the petitioner has focused virtually all of his attention (Rule 10(a)) is his claim that the *Vera Cruz* decision conflicts with decisions reached by a number of other federal courts. The petitioner also suggests, although not explicitly, that the Court of Appeals, in its *Vera Cruz* opinion, "has decided an important federal question in a way that conflicts with relevant decisions of this Court" (Rule 10(c)); that is, the plaintiff at least implies that the *Vera Cruz* decision is at odds with this Court's decision in *Tennessee v. Garner,* 471 U.S. 1, 85 L.Ed.2d 1, 105 S.Ct. 1694 (1985).

As will be shown in Section IV below, the *Vera Cruz* decision does not conflict with any other appellate or district court decision. While it is true that other Courts of Appeals have utilized, in the context of excessive force claims, a definition of "deadly force" as force that creates a substantial risk of causing death *or* serious bodily injury, none of those courts spent any time analyzing that issue. Rather, each simply used that definition as a starting point for the analysis that was actually at the heart

of the case pending before it. The outcome in those cases would not have changed even if the definition of "deadly force" adopted in *Vera Cruz* had been used. Those courts' use of the "death or serious bodily injury" definition of deadly force simply did not reflect a thorough-going and reasoned analysis of the question.

In addition, as the Court of Appeals made clear in its opinion, and is discussed in Section II below, the *Vera Cruz* definition of deadly force as "force reasonably likely to kill" not only is not at odds with this Court's opinion in *Tennessee v. Garner*, it is compelled by that decision, particularly in light of this Court's later decision in *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989).

B. The Issue Presented Here Need Not Be Decided By This Court, And In Any Case Is Not Yet Ripe For Review

Rule 10(c) sets out another circumstance under which this Court will consider granting certiorari: where an appellate court "has decided an important question of federal law that has not been, but should be, settled by [the Supreme] Court." There is no dispute that the definition of "deadly force" is an important question, but that alone is not enough to require this Court to accept the issue for review. However important a question may be in the abstract, it must be a question that *should* be settled by this Court. This case does not present such a question.

As the Court of Appeals conclusively showed in *Vera Cruz*, the definition of deadly force set out in that opinion is essential if this Court's decisions in *Tennessee v. Garner* and *Graham v. Connor* are not to be rendered moot. Since the definition naturally flows from the interplay of those two decisions, it is not necessary that this Court take its time to formally settle this issue, since it has, in effect, already done so. (Or, to avoid any possibility of

confusion, this Court could grant certiorari and summarily affirm the judgment of the Court of Appeals.)

This case also does not present a question that should be settled by this Court because it would be premature to do so at this time. The *Vera Cruz* opinion is the *only* one to directly address and analyze the question of what definition of "deadly force" should be used when deciding whether to apply the rule expressed by this Court in *Tennessee v. Garner*. While various of the cases cited by the petitioner have alluded to such a definition (one which admittedly is at odds with that reached by the Court of Appeals in *Vera Cruz*), only one—*Robinette v. Barnes*, 854 F.2d 909 (6th Cir. 1988)—did anything more than simply mention that definition and move on. And even in *Robinette* (and the one post-*Vera Cruz* case to address the issue, *Gutierrez v. City of San Antonio*, 139 F.3d 441 (5th Cir. 1998)), the Court of Appeals did not analyze the case law in order to reach its decision, but simply noted the need for a definition and the availability of such a definition from other sources (the Model Penal Code [MPC] in the case of *Robinette*, the Texas Penal Code and the San Antonio Police Department Procedures manual in the case of *Gutierrez*).

An issue that has been meaningfully analyzed in just a single decision is not one which is ripe for definitive review by the Supreme Court. See, e.g., the opinion of Justice Stevens respecting the denial of the petitions for writ of certiorari in *McCray v. New York*, 461 U.S. 961, 103 S.Ct. 2438, 77 L.Ed.2d 1322 (1983) and the opinion of Justice Marshall dissenting from the denial of certiorari in *Gilliard v. Mississippi*, 464 U.S. 867, 869, 104 S.Ct. 40, 41, 78 L.Ed.2d 179. A search on Westlaw indicates that so far, *Vera Cruz* has only been cited a single time since being decided, in an unpublished opinion out of the Ninth Circuit. The federal judiciary clearly has not yet had a chance to consider and assimilate the analysis offered by Judge Kozinski and his colleagues on this issue. Once it does, a consensus could well emerge, either

accepting the *Vera Cruz* definition of deadly force (the likely result, given the strength and clarity of its analysis) or, conceivably, rejecting it in favor of one similar to that offered by the petitioner here. Such a consensus would eliminate the need for this Court to itself address the issue.

Even if a conflict did result, the issue would then be more fully developed, enabling this Court to resolve the issue on a foundation consisting of a number of different fact situations and responsive legal analyses, which would obviously assist this Court in its own decision-making.

In short, however important in theory might be the question of the proper definition of deadly force, there simply is no compelling reason why *this* particular decision regarding that question should be reviewed by this Court, and accordingly this Petition for Writ of Certiorari should be denied.

C. Review Is Not Appropriate Here Because Even A Complete Reversal Would Not Change The District Court Judgment

The sole issue before this Court is whether *Vera Cruz* sets out the correct definition of deadly force. But even the adoption by this Court of the petitioner's definition would not change the judgment that was entered against him in the District Court.

It is true, as the petitioner states (Petition, page 6), that the District Court refused to give the jury the deadly force instructions requested by the petitioner, which incorporated the definition advocated by the petitioner here. (Petition, pages 6-8.). But, as the District Judge made clear in his ORDER DENYING PLAINTIFF'S MOTION FOR JUDGMENT AS A MATTER OF LAW OR, IN THE ALTERNATIVE, FOR A NEW TRIAL (AER 264-281), his decision was *not* based simply on his use of a definition of deadly force similar to that later adopted in the *Vera Cruz* appellate decision. Rather, Judge Jones

explicitly found that the evidence presented by the petitioner at trial did not justify the giving of deadly force instructions under even the petitioner's definition of deadly force. (AER 272-276)

> "The Court's conclusions may be summarized as follows:
>
> (1) That *Garner's* deadly force rule applies only to force posing substantial risk of resulting death, and the evidence failed to show a substantial risk of resulting death;
>
> (2) Alternatively, that the evidence presented did not merit a deadly force instruction because it failed to show that the probable outcome of a dog using the bite and seize apprehension technique would be serious bodily injury; . . . ." (AER 281)

Petitioner implies throughout his argument that the evidence presented at trial showed that the probable outcome of the use of the dog would be serious bodily injury. However, as the District Court's ruling demonstrates, no such showing was in fact made by the evidence presented by the petitioner at trial. Therefore, even if this Court were to grant certiorari here, and even if it were to completely reject the definition of deadly force set out by the Court of Appeals below and unqualifiedly adopt the definition proposed by the petitioner, it would not result in any change whatsoever to the judgment rendered against the petitioner in the District Court following the return of the jury's defense verdict. Thus, there is no real case or controversy for this Court to decide, and accordingly it should deny the Petition for Writ of Certiorari rather than agree to provide what would amount to an advisory opinion.

D. Regardless Of The Definition Of Deadly Force Used, *Tennessee v. Garner* Does Not Apply To This Case, Unless This Court Chooses To Expand The Scope Of That Decision

This Court's decision in *Tennessee v. Garner* dealt with "the constitutionality of the use of deadly force to prevent the escape of an apparently *unarmed* suspected felon." (471 U.S. at 3, 105 S.Ct. at 1697; emphasis added.) Here, there is no dispute that the petitioner *was* armed, with a large knife. Therefore, on its face, the *Garner* decision has no application here. To apply *Garner* to the present case, particularly if the petitioner's definition of deadly force were to be adopted, would expand the scope of the *Garner* decision, thereby endangering police officers, who would now have to hesitate when confronted by a suspect clearly capable of inflicting serious physical harm. Police work is dangerous enough without insisting that officers wait until they are attacked before being permitted to use even non-lethal force to subdue a suspect.

II. *VERA CRUZ* CORRECTLY INTERPRETS THIS COURT'S DECISIONS IN *TENNESSEE v. GARNER* AND *GRAHAM v. CONNOR*

The petitioner, in Section II of the Petition (at pages 16-20), suggests that the *Vera Cruz* court's definition of deadly force is at odds with this Court's decisions in *Tennessee v. Garner* and *Graham v. Connor*. But the opinion itself makes clear why it is the very interplay between those two cases that *mandates* the definition adopted in *Vera Cruz*. That discussion need not be repeated here, since it is set out so clearly and directly in the excellent opinion authored by Judge Kozinski.

Turning to the contentions made by the petitioner, the main thrust of this portion of the Petition is the petitioner's argument that:

> "Using force likely to cause serious bodily injury . . . amounts to punishment summarily imposed out of proportion to the crime which prompted police intervention. . . . The use of the MPC definition . . . is based on the understanding that the MPC definition best embodies a fundamental proportionality principle embedded in the Fourth Amendment. This principle is implicated when the police use of force is substantially likely to cause serious bodily harm, just as it is implicated by the police use of firearms which are more likely to kill. . . . Any less restrictive standard will ineluctably lead to an increase in deaths and serious physical injuries inflicted by police officers in situations in which the use of such force is not justified." (Petition, pages 17, 18, and 19.)

But the "proportionality" principle discussed by the petitioner was announced by this Court in its decision in *Graham*, not *Garner*,

> "Today we make explicit what was implicit in *Garner*'s analysis, and hold that *all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, . . ." (*Graham, supra,* 490 U.S. at 395, 109 S.Ct. at 1871; emphasis in original.)

Thus, utilization of the *Vera Cruz* definition of deadly force will in no way encourage police officers to use force out of proportion to that called for by the situation, since *that* is the very definition of excessive force under *Graham v. Connor*. The standard set out by this Court in *Tennessee v. Garner* does not apply generally to all those situations where there is a possibility that the suspect might suffer some sort of unwarranted punishment, but rather covers only the far more limited circumstance where a suspect's life itself is put at risk by the officer's use of force. (See the discussion in *Vera Cruz, supra,* 139 F.3d at 663.)

III. THE MODEL PENAL CODE'S DEFINITION OF DEADLY FORCE SIMPLY WAS NOT INTENDED FOR USE IN CIVIL CASES SUCH AS THIS

A key element of the present Petition for Writ of Certiorari is the petitioner's contention that the Model Penal Code has established a definition for deadly force, and that the *Vera Cruz* decision is out-of-step with both the MPC definition and various federal courts that have allegedly adopted this definition. As will be discussed in Section IV below, the courts in the other cases relied on by the petitioner did not in fact "adopt" the MPC definition. Furthermore, petitioner's reliance on the MPC definition reflects a fundamental misunderstanding of the purpose of the Model Penal Code.

Petitioner is correct in noting that the MPC does offer a definition of "deadly force" as "force that the actor uses with the purpose of causing or that he knows to create a substantial risk of causing death *or* serious bodily injury." (Section 3.11(2); emphasis added) (*Model Penal Code: Official Draft and Explanatory Notes* (1985) (American Law Institute, Philadelphia, PA) [hereafter "*MPC Official Draft*"].) But petitioner fails to note the *context* in which that definition is offered.

Section 3.11 is the "Definitions" section for Article 3 of the MPC, entitled "General Principles of Justification". "This article formulates justification for conduct that otherwise would constitute an offense, to the extent that it has seemed feasible to do so in general terms." (*Model Penal Code and Commentaries (Official Draft and Revised Comments)*, Part I, General Provisions, §§ 3.01 to 5.07, page 1 (1985) (American Law Institute, Philadelphia, PA) [hereafter "*MPC Commentaries*"].) The ten other sections of Article 3 provide the details of the affirmative defense of justification to criminal charges. Section 3.07 covers the "Use of Force in Law Enforcement".

It must be remembered that the MPC is a *criminal* code, not a civil code, and that "[t]he main aim of a criminal code is to differentiate conduct that warrants *criminal* sanctions from conduct that does not." (*MPC Commentaries,* page 4; emphasis added.) The drafters were not seeking to establish a civil standard for appropriate conduct (see Section 3.01(2)), and felt free to deviate from those standards when they deemed it appropriate for reasons of "sound legislative policy". (*MPC Commentaries,* page 2.)

The definition of "deadly force" contained in Section 3.11(2) is a unitary definition for *all* of Article 3 of the Code, not just the section dealing with the use of force by police officers. There is nothing in the MPC to indicate that the drafters made a conscious decision to apply the same definition of "deadly force" when referring to force applied by police officers in the course of their duties to force used by criminals in the course of their unlawful activities. And the commentaries to the MPC suggest otherwise.

Section 3.07(2)(b) sets out the MPC's standards for the use of deadly force by police officers. In the drafters' lengthy commentary on this section, a constant refrain is their concern over the use of firearms by law enforcement. (See, e.g., *MPC Commentaries,* page 111 ["*shoot* to prevent the escape"]; page 115 ["reckless use of *firearms*"]; page 116 ["in an age of *firearms*"]; all emphasis added.) And the drafters consistently discussed deadly force as that which would result in the death of the suspect. They noted that the common law rule permitted the "*killing* of a resisting or fleeing felon" because virtually all felonies originally were punishable by death. (*MPC Commentaries,* § 3.07, page 113.) Now, however, "[r]elatively few crimes are punishable by *death.*" (*Ibid.*) They also retreated from the common law rules "that allowed the *killing* of criminals" in order to prevent the commission of crimes (*id.* at 132), finding instead that

"resort to the privilege to *kill* in crime prevention will rarely be necessary." (*Id.* at 133.) (All emphasis added.)

In short, the drafters of the MPC were concerned with actions taken by police officers that might result in the *death* of criminal suspects, and sought to establish principles for the use of such deadly force. And they established these principles in the context of a *criminal* code, to clarify the circumstances under which police officers might be *criminally prosecuted* for their conduct, *not* to establish standards for determining whether they could be held civilly liable for that conduct. As the drafters themselves commented:

> "The police must make a practical and often hasty decision as to whether or not they are dealing with a person who may be a dangerous criminal in the sense of being a threat to life or limb. They are accustomed to making such decisions, and would rarely be *prosecuted* save in the most egregious of situations." (*MPC Commentaries*, § 3.07, page 124; emphasis added.)
>
> "No perfect principle of limitation can be formulated, but Paragraph (iv) [of Section 3.07(2)(b), which authorizes the use of deadly force by police officers to arrest persons suspected of crimes involving the use or threatened use of deadly force, or where the suspect poses a substantial risk of causing death or serious bodily injury if his or her apprehension is delayed,] proceeds from a valid premise and is susceptible of practical administration—the more so since the actor will, on the whole, be justified upon his own belief in the existence of the justifying peril. A challenge to that belief under Section 3.09(2) as reckless or negligent is likely to receive attention or prevail only in cases of extreme abuse, where deadly force is plainly indefensible under the criteria that are set forth." (*Id.* at 121-122, fn. 31.)

As the *Vera Cruz* opinion itself notes: "The MPC's definition and *Garner*'s deadly force rule serve entirely

different purposes: The MPC is designed to govern criminal liability; *Garner*'s deadly force rule sets the boundaries of reasonable police conduct under the Fourth Amendment." (*Vera Cruz, supra,* 139 F.3d at 662.) The MPC's definition of deadly force simply is not appropriate for cases such as this, and should not be utilized in circumstances for which it was never intended by its drafters.

IV. THERE IS NO MEANINGFUL CONFLICT BETWEEN THE *VERA CRUZ* DECISION AND DECISIONS OF OTHER FEDERAL COURTS

The petitioner cites to a number of decisions reached by various circuit courts of appeals and district courts in an attempt to show that the *Vera Cruz* decision is out-of-step with the prevailing view of the federal judiciary as to the definition of deadly force. Specifically, the petitioner argues that "all of the courts that have previously considered this issue" (Petition, page 11) have adopted the definition of deadly force set out in the Model Penal Code. However, as Judge Kozinski wrote in the *Vera Cruz* opinion, "the out-of-circuit cases, like our own earlier cases, are not very helpful because they did not confront the question presented here." (139 F.3d at 663.) "Thus, the earlier cases had no occasion to decide whether force likely to result in serious injury (but not death) amounted to deadly force." (*Id.* at 661.) A review of the cases cited by the petitioner shows that, rather than "adopting" the MPC definition, the most that the majority of them did was simply allude to it. "These courts seem to have seized the MPC's definition for want of anything better, but did not consider—had no occasion to consider—how it would apply on a record like ours." (*Id.* at 663.)

A. *Pruitt v. City of Montgomery*

The petitioner inaccurately asserts that the Eleventh Circuit in *Pruitt v. City of Montgomery, Alabama,* 771

F.2d 1475 (11th Cir. 1985) "rejected the definition later advanced by the Ninth Circuit in this case" and that it "held that the Model Penal Code deadly force definition . . . properly defined deadly force". (Petition, page 13.) The footnote which contains the *Pruitt* opinion's entire discussion on this subject does not even refer to a definition of deadly force as "force reasonably likely to kill", much less reject it. The only definition it rejected was one that "suggests that the use of deadly force occurs only when an officer shoots to kill." (*Id.* at 1479, fn. 10.) Such a definition would be at odds with the *Vera Cruz* definition, not just the MPC's, and so it was properly rejected by the *Pruitt* court.

Further, the *Pruitt* court did *not* "adopt" the MPC definition. Rather, it first commented that in *Tennessee v. Garner*, this Court had "adopted in large part" the MPC's deadly force rule—specifically, its abandonment of the common law rule which allowed the use of deadly force against *any* fleeing felony suspect. The court then set out the MPC's definition of deadly force, but *without* specifically finding that the MPC had stated the proper definition of deadly force for constitutional purposes. The court made no effort to analyze whether the MPC definition was in fact the proper one, and simply noted that the actions of the defendant officer (who shot the plaintiff) were "clearly encompass[ed]" by the MPC definition. (*Ibid.*) The court then concluded that the *officer's actions* amounted to "a 'use of deadly force' in the constitutional sense, concluding that such finding is consistent with *Garner.*" (*Ibid.*) Therefore, contrary to the petitioner's miscitation (Petition, page 13), the *Pruitt* court did *not* hold "that the Model Penal Code deadly force definition . . . properly defined deadly force 'in the constitutional sense.' " (Petition, page 13.) In light of all this, it cannot be said that the *Pruitt* decision conflicts with that of *Vera Cruz*.

B. *Robinette v. Barnes*

Similarly, in *Robinette v. Barnes,* 854 F.2d 909 (6th Cir. 1988), which involved the death of a suspect due to his being bitten by a police dog, the Court of Appeals did not "adopt" the MPC definition. The *Robinette* opinion, alone among the decisions cited by the petitioner, does directly confront the fact that this Court, in *Tennessee v. Garner,* "did not expressly define what constitutes deadly force." (*Id.* at 911.) The *Robinette* court, after discussing *Garner,* concludes that "whether deadly force has been used to seize a criminal suspect must be determined in the context of each case." It then notes that the authors of the MPC have "acknowledge[d] this fact in their definition of deadly force," which the Court then sets out. (*Id.* at 912.) But rather than "adopting" this definition, the *Robinette* court simply finds the MPC definition:

> "a useful statement of the *two factors most relevant* to the determination of whether the use of a particular law enforcement tool constitutes deadly force: the *intent* of the officers to inflict death or serious bodily harm and the *probability,* known to the officer but regardless of the officer's intent, that the law enforcement tool, when employed to facilitate an arrest, creates a 'substantial risk of causing death or serious bodily harm.'" (*Ibid.*; emphasis added.)

It is true that in that comment, there is the implicit acceptance of the definition of deadly force offered by the MPC—that it is force that creates a " 'substantial risk of causing death or serious bodily harm.' " But the *Robinette* court had no reason to analyze whether that portion of the MPC definition was correct, because:

> "Applying these factors to the present case, we conclude that Barnes did not employ deadly force to apprehend Daniel Briggs . . . [W]e find that the use of properly trained police dog to apprehend a felony suspect does not carry with it a 'substantial risk of

causing death *or* serious bodily harm.' " (*Ibid.*; emphasis added, footnote omitted.)

Since the *Robinette* court found that the use of the police dog did not create a substantial risk of causing *either* death or serious bodily harm, it therefore had no need to determine whether the MPC definition of deadly force was correct in order to reach its ultimate conclusion: that the use of the police dog on this occasion, even though it resulted in the suspect's death, did not amount to the use of deadly force. Thus *Robinette* cannot properly be cited as supporting the MPC's definition of deadly force. At best, all that can be said is that the *Robinette* court did not *reject* that definition. Accordingly, it cannot be said that the *Robinette* decision conflicts with that of *Vera Cruz*.

C. *Matthews v. Jones*

Petitioner cites *Matthews v. Jones*, 35 F.3d 1046, 1051 (6th Cir. 1994) as "reaffirming the validity of the approach in *Robinette* and the use of the Model Penal Code definition of 'deadly force' ". (Petition, page 13.) But like *Robinette*, whose reasoning the *Matthews* court *does* adopt, the *Matthews* decision does not "adopt" the MPC definition of deadly force. Rather, in its rejection of the plaintiff's claim that he was subjected to the use of deadly force when he was bitten by a police dog, the *Matthews* court simply used the MPC definition in the same manner as in the *Robinette* opinion. (*Id.* at 1050-1051.)

The *Matthews* court noted that there was no evidence of any improper training of the dog, no evidence of any intent on the part of the officer to cause death or serious injury, and no evidence to show that the dog was used in an inappropriate manner. (*Id.* at 1051.) And so, just as in *Robinette*, there was no need for the *Matthews* court to analyze whether the MPC definition was too broad, since even under its definition, the plaintiff had not been subjected to deadly force.

Of particular relevance to the issue now before this Court, the *Matthews* court pointed out that "[a]lthough *Robinette* was decided before *Graham*, it was decided under the 'objective reasonableness' standard which the latter requires." (*Ibid.*) In other words, despite the citation in the *Robinette* and *Matthews* decisions to the MPC definition—with its reference to "serious bodily harm"—neither court felt that this Court's decision in *Tennessee v. Garner* was implicated in the case before it. Rather, both courts found that challenges to the use of this type of force simply involve the generalized question of the reasonableness of the amount of force used, as discussed by this Court in *Graham*. Therefore, *Matthews* too is not in conflict with *Vera Cruz*.

D. *Marley v. City of Allentown*

The petitioner asserts that the Third Circuit "affirmed the use of a 'deadly force' instruction based upon the MPC definition" by affirming, *without opinion*, the District Court's ruling in *Marley v. City of Allentown*, 774 F.Supp. 343 (E.D.Pa. 1991). Ignoring the fact that an unpublished affirmance hardly amounts to the adoption of a formal position by a circuit, the *Marley* opinion simply does not say what the petitioner claims. While the opinion, written regarding the District Court's denial of the defendant's motion for judgment notwithstanding the verdict or, in the alternative, for new trial, does reaffirm that the giving of a deadly force instruction was appropriate, the content of that instruction is not discussed *at all* in the opinion. Nor is the MPC even mentioned. So the petitioner had absolutely no basis for his categorical assertion that the Third Circuit had "affirmed the use of a 'deadly force' instruction based upon the MPC definition". Therefore it is clear that *Marley* cannot be cited as a case in conflict with *Vera Cruz*.

E. *Ryder v. City of Topeka*

The petitioner cites to *Ryder v. City of Topeka*, 814 F.2d 1412, 1416 fn.11 (10th Cir. 1987), asserting that

"[t]he *Ryder* court emphasized that 'deadly force does not occur only when the suspect actually dies,' "—which is fully consistent with the *Vera Cruz* definition of deadly force—"and noted that '[s]everal courts have adopted the Model Penal Code definition of deadly force.' " (Petition, page 14.) This accurately states the limited ruling of the *Ryder* court, which did not itself "adopt" the MPC definition. Nor did it offer any analysis of that—or any other—definition. Thus the *Ryder* decision does not conflict with *Vera Cruz*.

F. *Mathis v. Parks*

The petitioner cites *Mathis v. Parks*, 741 F.Supp. 567 (E.D.N.C. 1990), in which the District Court denied a motion to dismiss made on the ground of qualified immunity by the two police officer defendants. The District Judge did not mention the MPC or any specific definition of deadly force, noting simply that "the potential applicability of *Garner's* fourth amendment analysis would be apparent, since a reasonable officer would be aware that a full-force blow delivered to the abdomen using the knee as a blunt instrument *could* constitute deadly force", citing to *Robinette*. (*Id.* at 572; emphasis added.) In a footnote, the District Judge notes that "*Robinette* takes the common-sense approach that objects other than the obviously lethal gun or knife can cause death." (*Id.* at 572 fn. 3.) The footnote concludes with the statement: "Moreover, it is not required that the offending police officer apprehend that death might result; rather, it is only necessary that the officer think his use of force might cause serious bodily harm." (*Ibid.*)

But the District Court's sole support for this last statement is a citation to *Robinette*, and as noted above in Section IV.B., the *Robinette* court did *not* reach the conclusion suggested by the District Judge, because it had not needed to. The *Robinette* decision at most held that *even if* the definition of deadly force were as broad as that suggested by the MPC—i.e. force likely to cause

death *or* serious bodily harm—there was no use of deadly force in the case pending before it. The District Judge was thus overreading *Robinette,* therefore *rendering his* dicta, offered in a footnote, unreliable as authority. Accordingly, *Mathis* too cannot be said to be meaningfully in conflict with *Vera Cruz.*

G. *Mattis v. Schnarr*

The petitioner correctly notes that in *Mattis v. Schnarr,* 547 F.2d 1007, 1009 and fn.2 (8th Cir. 1976), "[t]he Eighth Circuit *employed* the MPC formulation" (Petition, page 14; emphasis added) in order to evaluate the constitutionality of a Missouri statute governing when police officers could use deadly force to effect the arrest of a felony suspect. However, despite that footnote, the decision in fact does *not* adopt the MPC definition. The opinion, written a decade before this Court's decision in *Tennessee v. Garner,* is a bellwether for that opinion, making the same arguments and reaching the same conclusion. As was the case with this Court's decision in *Tennessee v. Garner,* the reason the *Mattis* court found the statute before it to be unconstitutional was not because it allowed police officers to use force that might cause serious bodily harm, as the MPC definition provides, but because it allowed the officers to endanger the *lives* of suspects in circumstances where such force was inherently excessive. "We are concerned with the right of an individual *life.* . . . Clearly, the right to *life* is 'fundamental,' . . ." (*Mattis, supra,* 547 F.2d at 1017; emphasis added.) Accordingly, *Mattis,* which pre-dates both *Garner* and *Graham,* not only does not conflict with *Vera Cruz,* it actually supports the conclusion reached in *Vera Cruz.* (See the discussion regarding *Garner,* and therefore implicitly *Mattis,* in *Vera Cruz, supra,* 139 F.3d at 663.)

H. Ninth Circuit Cases

The petitioner asserts that "[e]ven the Ninth Circuit had previously *supported* the MPC definition of deadly

force as the appropriate standard to determine whether an application of force by the police had to meet the *Tennessee v. Garner* standard." (Petition, page 15; emphasis added.) This assertion was rejected in the *Vera Cruz* decision itself, when the Court of Appeals noted that:

> "Although we have mentioned the 'significant risk of death or serious bodily injury' formulation in three other dogbite cases, we have done so only in dicta. In fact, two of the cases [*Fikes v. Cleghorn*, 47 F.3d 1011, 1014-1015 (9th Cir. 1995) and *Quintanilla v. City of Downey*, 84 F.3d 353, 357-358 (9th Cir. 1996)] simply refer to the fact that one of our colleagues relied on the MPC in his lonely effort to define deadly force in *Chew v. Gates*, 27 F.3d 1432, 1453 & n.4 (9th Cir. 1994) (Norris, J., concurring and dissenting). . . . [These] earlier cases had no occasion to decide whether force likely to result in serious injury (but not death) amounted to deadly force." (*Vera Cruz, supra*, 139 F.3d at 661.)

The Ninth Circuit as a whole clearly agrees with the *Vera Cruz* court's conclusion that its definition of deadly force is not in conflict with *Chew*, *Fikes*, or *Quintanilla* since the circuit judges as a group rejected the petitioner's request for an *en banc* hearing in this case.

I. Post-*Vera Cruz* Case

The respondent has discovered only a single case decided after the original *Vera Cruz* opinion was issued that touches on the question of the proper definition of deadly force, *Gutierrez v. City of San Antonio*, 139 F.3d 441 (5th Cir. 1998). In that case, the two defendant police officers "hog-tied" a suspect and placed him in the rear of their patrol car. The plaintiffs alleged that because of the position of the suspect's face when placed in the vehicle, he died of asphyxiation. (*Id.* at 443-444.) The District Court denied the officers' motion for summary judgment, made on the ground of qualified immunity.

The Court of Appeals, after evaluating the evidence, dismissed the interlocutory appeal on the basis that there were material disputes of fact which precluded it from "determining the objective reasonableness of the officers' conduct". (*Id.* at 442.)

In addressing the officers' qualified immunity claim, the appellate court first had to determine whether the right at issue was "clearly established". The court concluded that hog-tying could constitute the use of deadly force, and that the circumstances under which deadly force can be utilized were clearly established. (*Id.* at 446.) In deciding whether hog-tying could constitute deadly force, the *Gutierrez* court naturally cited to this Court's decision in *Tennessee v. Garner,* but then continued that:

> "Although guns represent the paradigmatic example of 'deadly force,' *Garner* failed to address whether other police tools and instruments can also be characterized as 'deadly force.' Lower courts have struggled with whether to characterize various police tools and instruments as 'deadly force.' . . . These courts have generally described 'deadly force' as force 'carry[ing] with it a substantial risk of causing death or serious bodily harm.' *Robinette,* 854 F.2d at 912. Although we have not had occasion to adopt this description, both the Texas [Penal Code] statute and SAPD procedures in effect in November 1994 employed it. . . . Accordingly, we find both the definition of 'deadly force' and *Garner*'s holding to have been clearly established prior to November 1994." (*Ibid.*)

Despite citing to both *Robinette* and *Quintanilla,* the *Gutierrez* court did *not* cite to *Vera Cruz,* even though the original opinion issued in *Vera Cruz* had been issued six months earlier. And, like all of the cases cited by the petitioner, the *Gutierrez* court did not engage in any analysis in coming up with its definition of deadly force (in contrast to what makes up virtually the entire opinion

in *Vera Cruz*). Just as in those other cases, the *Gutierrez* court simply seems to have adopted a definition that was conveniently at hand. (See *Vera Cruz, supra,* 139 F.3d at 663.) And the opinion in *Gutierrez* does not depend on a definition of deadly force that includes as one of its elements the potential for causing "serious bodily harm", rather than just death, since the evidence clearly raised a material factual dispute as to whether hog-tying does present a substantial risk of causing *death,* at least under the circumstances presented to the *Gutierrez* court.

In short, just as with all the cases cited by the petitioner, *Gutierrez* does not meaningfully conflict with *Vera Cruz,* because it presents no analysis explaining or justifying its adoption of a definition of deadly force similar to that advocated by the petitioner here, and because the definition adopted by the court was not necessary to its decision. In fact, in all these cases, including *Gutierrez,* the identical result would have been reached even if each of the courts had utilized a definition similar to that adopted in *Vera Cruz.* Therefore, contrary to the petitioner's sweeping assertion otherwise (at page 11 of his petition), the decision below does not conflict with *any* of the decisions of other circuits that have addressed this issue.

V. THE PETITIONER'S CONCERN ABOUT UPSETTING EXISTING POLICE STANDARDS REGARDING DEADLY FORCE IS NOT A BASIS FOR GRANTING CERTIORARI HERE

The petitioner argues that accepting the *Vera Cruz* definition of deadly force "would undermine the extensive national consensus on the definition of 'deadly force' ". (Petition, pages 16-17.) But the petitioner fails to offer even a suggestion as to where that "consensus" came from. It is probable that that consensus is a reaction to the lack of an authoritative definition of deadly force from the courts, and simply reflects a decision by police

departments to adopt a broad definition in order to protect against possible civil liability. Furthermore, the *criminal* definition of deadly force is something that police officers work with every day, and so what could be more natural than for their departments to adopt *that* definition in the absence of any definitive one in the civil arena?

But even if there is more to the "consensus" than just convenience and fear of lawsuits, that would not be a basis for granting certiorari. The petitioner contends that in *Tennessee v. Garner*, "[t]his Court stressed the relevance of actual department policies in defining the Fourth Amendment limits on the use of force." (Petition, page 16.) But this Court merely stated that it "would hesitate to declare a police practice of long standing 'unreasonable' if doing so would severly hamper effective law enforcement." (*Garner, supra*, 471 U.S. at 19, 105 S.Ct. at 1705.) The opposite sort of situation is presented here.

Here, the rejection of the MPC definition would *not*, as suggested by the plaintiff, "inevitably result in an increase in the incidence of deaths and serious bodily injuries caused by the police in a wide range of police encounters with members of the community" (Petition, page 17), for the simple reason, as discussed in Section II above, that adoption of the *Vera Cruz* definition of deadly force would still not change the fact that this Court's opinion in *Graham v. Connor* precludes the use of *any* sort of force—deadly or not—that is out of proportion to that called for by the situation. Therefore, general adoption of the *Vera Cruz* definition by police departments would *not* cause any change in "police practice[s] of long standing". Thus, the petitioner's apprehension about upsetting existing police standards regarding deadly force does not provide a basis for granting certiorari in this case.

CONCLUSION

The *Vera Cruz* decision has created a bright-line test for when this Court's decision in *Tennessee v. Garner* comes into play. In contrast, the petitioner's "serious bodily harm" formulation contains far too many variables to be workable; for example, it will inevitably result in widely conflicting verdicts by juries presented with virtually identical factual scenarios. To adopt the petitioner's definition is to condemn the federal courts to endless appeals requiring case-by-case determinations of whether a particular use of force, under a specific factual scenario, could, as a matter of law, potentially be considered deadly force. Police officers will be left with no guidance at all, since virtually *any* use of force could be described in hindsight as the application of "deadly" force. A clear standard is needed, and only the *Vera Cruz* definition provides it.

For all these reasons, the respondent urges the Court to deny this petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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DATED: August —, 1998